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March 14, 2000

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VIA HAND DELIVERY

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of the Petition of NewPath Holdings, Inc. for an Expedited Declaratory Ruling on the Scope of Unbundled Access to the High-Frequency Portion of Loops

Enclosed for filing with the Commission, pursuant to 47 C.F.R. § 1.2, please find an original and four (4) copies of NewPath Holdings, Inc.'s Petition for an Expedited Declaratory Ruling on the Scope of Unbundled Access to the High-Frequency Portion of Loops. An additional copy of this filing has also been provided for date-stamp and return.

Please direct any questions concerning this filing to me at the address or phone number listed above. Thank you.

Sincerely,

Lawrence Freedman /rw

Lawrence R. Freedman
Counsel for NewPath Holdings, Inc.

Enclosures

cc: Commissioner William E. Kennard, Chairman
Commissioner Susan Ness
Commissioner Harold W. Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Michelle Carey, Division Chief, Policy & Program Planning Division
Mick Herke (via overnight mail)

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
Petition of NewPath Holdings, Inc.)
For an Expedited Declaratory Ruling on the)
Scope of Unbundled Access to the)
High-Frequency Portion of Loops)

CC Docket No. 0050

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OFFICE OF THE SECRETARY

**PETITION FOR
EXPEDITED DECLARATORY RULING
OF
NEWPATH HOLDINGS, INC.**

March 14, 2000

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**PETITION FOR
EXPEDITED DECLARATORY RULING
OF
NEWPATH HOLDINGS, INC.**

NewPath Holdings, Inc. ("NewPath"),¹ by its attorneys and pursuant to 47 C.F.R. § 1.2, hereby petitions the Commission for an expedited declaratory ruling on the scope of unbundled access to the high-frequency portion of loops as ordered and adopted by the Commission in its Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355, released December 9, 1999 ("Line Sharing Order").² In particular, NewPath seeks a declaration from the Commission that an ILEC's obligation to provide nondiscriminatory, unbundled access to the high-frequency or "data" portion of a loop under the Line Sharing Order and 47 C.F.R. § 51.319(h) applies to loops on which a carrier is reselling the ILEC's analog, circuit-switched voiceband services ("resale loops").

¹ NewPath is a small, emerging provider of competitive data services located in Des Moines, Iowa. Initially, NewPath intends to provide xDSL services and technologies to small business and residential customers primarily located in rural cities in the Midwestern United States. To the extent market, technological, and regulatory conditions warrant, NewPath contemplates potentially supplementing its data services with analog voice services, offered as a bundled service package on a single loop.

² In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel'd December 9, 1999).

INTRODUCTION AND SUMMARY

The Commission's recently released Line Sharing Order amends the Commission's local competition rules to require ILECs to provide requesting carriers with nondiscriminatory access to the data portion of a loop as an unbundled network element ("UNE"). The driving force behind the Line Sharing Order was a substantial competitive advantage held by ILECs over competing providers of advanced telecommunications services. In short, ILECs had exclusive access to the data frequencies on loops carrying ILEC voiceband services. With this exclusive access, ILECs could, and indeed did, simply add data services to an end user's existing voice line at little or no marginal cost, while other data providers were forced to "compete" with less efficient and prohibitively expensive alternative pathways to the customer.

The Commission's express goal in the Line Sharing Order was to "level the competitive playing field" by giving competitive data providers the same opportunity as the ILECs to provide data services to customers on their existing voice lines.³ To "level the field," the Line Sharing Order requires an ILEC to provide a requesting carrier with nondiscriminatory unbundled access to the data portion of loops, but only for those loops "on which the incumbent LEC is also providing analog voice service."⁴ Ostensibly, the limitation on access only to loops where the ILEC is the voice provider was intended to reflect active voice loops that the ILEC controls, and thus, has exclusive access to the data frequencies. This broadly stated limitation, however, can potentially be read not to address or, at the very least, not to definitively include a significant marketplace condition where the ILEC is not "providing analog voice service" directly to the end user, yet still retains exclusive access to the data frequencies on the loop: resale loops.

³ Line Sharing Order at ¶ 35.

⁴ Id. at ¶ 72.

The purpose of this petition is to request that the Commission quickly and definitively state that the unbundling obligations in the Line Sharing Order apply to resale loops. For clarity, NewPath has broken its request down into three simple concepts.

First, if the Line Sharing Order does not contemplate unbundled access to the data frequencies on resale loops, it certainly should have. Competing data providers face the same ILEC monopoly stranglehold on the data portion of loops and the same four unworkable market alternatives discussed in the Line Sharing Order whether a customer's voice service is provided by an ILEC directly or indirectly through a reseller. The same rationales in the Line Sharing Order that warranted unbundled access to the data portion of ILEC voice loops apply without distinction to resale loops.

Second, even if the Line Sharing Order can be read to require unbundled data access to resale loops, its broad language presents a substantial danger that ILECs faced with requests for such access will not read it that way. Petitions for reconsideration of the Line Sharing Order filed by AT&T⁵ and MCI Worldcom⁶ document the interpretive games that the ILECs are willing to play in order to delay the loss of their entrenched data access advantage. The definitive declaratory ruling that NewPath seeks on resale loops is necessary to ensure the full realization of the "level competitive playing field" envisioned by the Line Sharing Order.

Third, it is imperative that the declaratory ruling sought in this petition be made on an expedited basis. The Commission itself has stressed that "any delay in the provision of the high frequency portion of the loop will have a significant adverse impact on competition in the

⁵ Petition of AT&T Corporation for Expedited Clarification or, in the Alternative, for Reconsideration, CC Docket Nos. 98-147 & 96-98 (filed February 9, 2000).

⁶ Petition for Clarification of MCI Worldcom, CC Docket Nos. 98-147 & 96-98 (filed February 9, 2000).

provision of advanced services to customers”⁷ Indeed, the Line Sharing Order is laced with admonitions and tools to avoid delay in implementing competitive access to the data portion of loops.

As currently drafted, the Line Sharing Order’s failure to definitively address resale loops presents a significant threat to the full and timely realization of the Order’s clear intent and purpose. NewPath therefore requests an expedited declaratory ruling that an ILEC’s obligation to provide nondiscriminatory, unbundled access to the high-frequency or “data” portion of a loop under the Line Sharing Order and 47 C.F.R. § 51.319(h) applies to resale loops.

DISCUSSION

I. The Same Rationales in the Line Sharing Order That Warranted Unbundled Access to the Data Frequencies on ILEC Voice Loops Apply to Resale Loops

In the Line Sharing Order, the Commission chose to eliminate the widespread ILEC stranglehold on the data pathways of active voice telephone lines by requiring ILECs to make such pathways available to requesting providers as UNEs. In accordance with the Commission’s Local Competition Third Report and Order⁸ and Section 251(d)(2) of the Telecommunications Act of 1996 (“Act”),⁹ the Commission’s focus in ordering unbundled access to the data portion of loops was whether a CLEC is “impaired” in providing data services without unbundled access to the data frequencies on an active voice telephone line.

The Commission found impairment under Section 251 by looking to the viability of the four possible market alternatives available to a CLEC without unbundled access to the data

⁷ Line Sharing Order at ¶ 161.

⁸ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel’d November 5, 1999).

⁹ 47 U.S.C. § 251(d)(2).

frequencies on an active voice line: (1) self-provisioning a second loop; (2) leasing a second loop from the ILEC; (3) leasing a customer's existing voice loop and assuming the voice service responsibilities; and (4) obtaining access from a third party.¹⁰ The Commission found that each of these alternatives failed to provide a "level competitive playing field" when the ILEC retained access to the data pathway on an existing voice line.¹¹

Although the Line Sharing Order is not clear on its face whether unbundled access extends to the data portion of resale loops, it is abundantly clear that the Commission's "impairment" analysis in the Line Sharing Order nevertheless captures the resale scenario. Competing data providers face the same four inefficient and prohibitively costly market alternatives addressed in the Line Sharing Order whether a customer's voice service is provided by an ILEC directly or indirectly through a reseller. In both cases, the ILEC retains control over the data frequencies on the line and derives the same monopolistic advantages of its exclusive access to that pathway. It is this exclusive access, not the name of the provider of a customer's voice bill, that allows an ILEC to offer data services on a customer's existing voice line, while other data providers are relegated to competing with second lines, leasing the customer's existing line with the attendant voice service responsibilities, or obtaining some other data pathway to the customer through a third party.

Competing data providers seeking access to the data frequencies on resale loops are not only faced with the same four market alternatives addressed in the Line Sharing Order, the Commission's rationales in determining that each of these market alternatives are not viable can essentially be replicated in the declaratory ruling on resale loops that NewPath now seeks.

¹⁰ Line Sharing Order at ¶¶ 36-53.

¹¹ Id.

A. Self-Provisioning a Second Loop

In the Line Sharing Order, the Commission found that “[t]he record is conclusive that carriers seeking to deploy voice-compatible xDSL-based services cannot self-provision loops . . . self-provisioning entire loops is not a viable alternative to the incumbent’s unbundled loop because replicating an incumbent’s vast and ubiquitous network would be prohibitively expensive and delay competitive entry.”¹² These barriers do not change if the voice provider on a line is a reseller rather than an ILEC.

B. Leasing a Second Loop from the ILEC

In rejecting this alternative, the Commission focused on three substantial barriers presented by leasing a second loop to provide data services to a customer. Each of these barriers are present in the resale context.

First, “second loops are not ubiquitously available.”¹³ The absence of available second loops is not unique to ILEC voice customers.

Second, the Commission recognized that, when available, second loops are prohibitively expensive to a competing data provider relative to an ILEC’s marginal cost of adding xDSL to the end user’s voice loop.¹⁴ The economics do not change in the resale context. On one side, a competing data provider pays the same amount for a second loop no matter who the voice provider is on the first line. On the other side, an ILEC’s cost of adding data services to an existing voice line are marginal without regard to the ultimate voice provider. As the Commission recognized, an ILEC allocates and recovers virtually all of its loop costs to their voice services. This allocation does not change in the resale context. Indeed, the only change is

¹² Line Sharing Order at ¶ 37.

¹³ Id. at ¶ 38.

¹⁴ See id. at ¶ 39-41.

who the cost is allocated to -- a reseller instead of the voice services end user. The principle underlying the avoided cost resale discount charged to resellers of ILEC voice services is that the ILEC is recovering the same costs that it would otherwise receive from an end user with the exception of service costs that are assumed by the reseller. In sum, an ILEC is left in the same advantageous economic position to provide data services on an existing voice line whether it is the direct or indirect provider of those voice services.

Third, the Commission recognized that “a competitive carrier faces a competitive disadvantage in providing xDSL over a second line when competing against the incumbent’s single line offering.”¹⁵ Again, the same holds true in the resale context. Without unbundled access to the data portion of a loop, only the ILEC can offer a resale voice customer the convenience of data and voice services on one line.

C. Leasing the Entire, Existing Voice Loop from the ILEC

In rejecting this alternative, the Commission recognized that competitive data providers would be impaired if they were required to assume the responsibilities of a UNE-based, voice services provider in order to provide data services to a customer.¹⁶ According to the Commission:

[R]equiring competitive LECs to provide voice services could require large investments in circuit switching network architectures that may have little to do with a requesting carrier’s intention to offer advanced data services. Investments in circuit switched networks may only be justified by carriers that have attained sufficient scale and scope economies to justify deploying large-scale circuit switched networks. For other entrants, requiring this investment diverts financial resources and management focus away from competitive LECs’ ability to offer advanced services and frustrates a requesting carrier’s plan to migrate telecommunications services from circuit switched to packet switched networks.¹⁷

¹⁵ Line Sharing Order at ¶ 42.

¹⁶ See id. at ¶¶ 44-52.

¹⁷ Id. at ¶ 45.

The same costs and diversion of resources described by the Commission in the Line Sharing Order are invoked in the resale context if competitive data providers were forced to become UNE-based, voice service providers to break an ILEC's data access monopoly on resale loops.

The impairment recognized by the Commission in leasing a customer's existing voice line is clearly at its height in cases where competitive data providers have no desire to displace the ILEC or a reseller as the voice services provider on a line. It should also be recognized, however, that the Commission's rationales reflect the same measure of impairment in cases where competitive data providers seeking access to the data frequencies on a resale loop are themselves the resale voice provider on the loop.

Without unbundled access to the data portion of the loop, the competitive provider seeking data access to its resale customer's voice line would have to abandon its resale-based voice strategy in exchange for a UNE-based, circuit-switched voice service platform. Facilities-based voice service is a substantially greater undertaking and investment than resale, requiring substantial new administrative and regulatory burdens and, in most cases, significant increases in facilities and equipment expenditures. Indeed, a number of the burdens implicated by such a forced transition are impairments that the Commission specifically identified in the Line Sharing Order, including investment in switching facilities¹⁸ and devoting managerial and financial resources to administrative and regulatory issues like E911 and number portability.¹⁹

¹⁸ To a degree, the transition of a resale voice circuit to a full-circuit UNE platform could eliminate the need for a competitive data provider to procure its own switching equipment. As provided in the Local Competition Third Report and Order, however, full-circuit UNE platforms are not universally available, nor does the UNE platform eliminate other substantial facilities, regulatory, and administrative burdens beyond the cost of switches. Moreover, petitions for reconsideration of the Line Sharing Order filed by AT&T and MCI Worldcom demonstrate that ILECs are currently invoking the Line Sharing Order to thwart CLEC efforts to use even the UNE platform as a pathway for single-line voice and data services.

¹⁹ See Line Sharing Order at ¶ 44.

A forced transition from resale to facilities-based voice service also implicates the Commission's concern with the diversion of data providers' resources and focus from advanced services and the migration of circuit-switched to packet-switched voice services. In discussing this concern, the Commission stressed the importance of giving data providers the freedom "to begin to build a base of data customers and focus their innovation efforts upon providing packet-switched services which may substitute for traditional voice services over time."²⁰ A costly and time-consuming transition from resale to UNE-based voice service in order to provide data service on a customer's existing voice line will severely impair this freedom. In contrast, providing voice resellers unbundled access to the data frequencies on their voice loops will not only allow the provider to build a base of data customers, it affords such a provider an economical, efficient, and flexible avenue to gain valuable voice telephony experience and credibility for an eventual transition to packet-switched voice service as the Line Sharing Order contemplates. Moreover, such access gives data-focused CLECs the ability to effectively compete with the ILECs and established voice CLECs now in offering customers a "one-stop-shopping" alternative of bundled voice and data services.

Finally, a forced transition for voice resellers to UNE-based service in order to obtain access to the data pathways to their voice customers would not be consistent with the Commission's express desire for service offerings to be based on "marketplace forces, not regulatory fiat."²¹ A data provider should not be forced to forfeit its right under Section 251 of the Act to provide voice services through resale in order to provide data services to customers without the recognized competitive disadvantages of using a second line or a third party.

²⁰ Line Sharing Order at ¶ 52.

²¹ Id. at ¶ 49.

The reasoning of the Line Sharing Order itself demonstrates that leasing a customer's existing voice line in order to obtain access to the data frequencies on that line is not a viable market alternative for data providers seeking access to the data frequencies on a resale loop no matter who is reselling the customer's voice service.

D. Obtaining Data Access Through a Third Party

In rejecting this alternative, the Commission found that "the record also shows that requesting carriers are not presently obtaining the high frequency portion of the loop from third-party sources rather than from the incumbent LEC under the section 251(c) unbundling obligation. At this time, there is no evidence of such alternatives in the record, nor are we aware of competitive LECs that provide analog voice service offering to partner with competitive LECs offering data services to share unbundled loops obtained from incumbent LECs."²² This obstacle does not change for data providers seeking data access to resale loops.

If the Line Sharing Order did not provide for unbundled access to the data portion of resale loops, no matter who the reseller is, its "impairment" analysis and unbundling rationales clearly do. The Commission should expressly rule that the unbundling obligation imposed by the Line Sharing Order extend to resale loops.

II. The Line Sharing Order Does Not Ensure Competitive Access to the Data Frequencies on Resale Loops

The declaratory ruling sought in this petition is not only consistent with the terms of the Line Sharing Order, it is necessary to ensure that the unbundling obligations imposed by the Line Sharing Order extend to the entire "competitive playing field" that the Commission clearly intended to accomplish.

²² Line Sharing Order at ¶ 53.

The Line Sharing Order currently requires ILECs to provide unbundled access to the data portion of “loops on which the incumbent LEC is also providing analog voice service.”²³ Arguably, this broadly stated limitation can be read to contemplate resale loops in that ILECs are providing the analog voice service on resale loops, albeit indirectly. Indeed, as discussed above, the Commission’s rationales and discussion in the Line Sharing Order suggest that the Line Sharing Order should be read and applied just this way. As currently drafted, however, the Line Sharing Order presents a danger that ILECs will choose to follow a much narrower interpretation of their unbundling obligation. In particular, the imprecision of the Line Sharing Order’s current language threatens to fuel ILEC claims that they are not “providing analog voice service” on resale loops, and thus, are under no obligation to make the data pathways on such loops available to competitors.

As discussed earlier, any interpretation of the Line Sharing Order that excludes resale loops from the Order’s unbundling obligations would be wholly arbitrary when the rationales and discussion underlying the Commission’s decision are examined. Yet, as currently drafted, the Line Sharing Order invites this arbitrary interpretation from ILECs fully incented to cling to any vestige of the data access advantage that the Line Sharing Order expressly set out to eliminate.

The present availability of competitively priced and marketable data services alternatives to existing and future advanced telecommunications customers should not be contingent on an ILEC’s interpretive discretion. Moreover, competitive data providers and their customers should not have to endure the costly and dilatory submission, rejection, and litigation of requests for access to the data frequencies on resale loops to realize the “level competitive playing field” that the Line Sharing Order purports to mandate now. A declaratory ruling definitively extending the

²³ Line Sharing Order at ¶ 72.

unbundling obligations of the Line Sharing Order to resale loops is necessary to efficiently and effectively implement the full measure of competitive data access that the Commission set out to achieve through the Line Sharing Order.

III. A Declaratory Ruling Definitively Requiring ILECs to Unbundle the Data Frequencies on Resale Loops Should be Made on an Expedited Basis

The declaratory ruling that NewPath seeks is not only appropriate and necessary, it should be made as fast as possible. Indeed, in requesting and arguing the importance of expedited action, NewPath believes that it is essentially preaching to the choir. As the Commission itself has stated:

We firmly believe that any delay in the provision of the high frequency portion of the loop will have a significant adverse impact on competition in the provision of advanced services to customers²⁴

A clear and resounding theme throughout the Line Sharing Order is the supreme importance of the full implementation of unbundled data access to the data portion of loops on an accelerated schedule and without delay. Indeed, the Line Sharing Order provides a laundry list of extraordinary admonitions and tools to accelerate the implementation of its provisions:

- **Amendment of Existing Agreements** – “[P]arties should be able to negotiate amendments to their interconnection agreements to include line sharing no later than 180 days of release of this order.”²⁵
- **Interim OSS Modifications** – “[W]e urge state commissions not to permit incumbent LECs to delay the availability of access to the high frequency portion of the loop while they implement automated OSS solutions.”²⁶
- **Interim Arbitration Awards** – “We strongly urge states to issue binding interim arbitration awards that would require the incumbent to begin to provision this unbundled

²⁴ Line Sharing Order at ¶ 161.

²⁵ Id. at ¶ 162.

²⁶ Id. at ¶ 106.

network element on interim arbitration terms and conditions within 180 days of release of this order.”²⁷

- **Amendment of SGATs** – “[W]e encourage the BOCs expeditiously to amend their SGATs”²⁸
- **Post-Arbitration Implementation Schedule** – “[W]e strongly urge states to adopt an implementation schedule that requires an incumbent to begin provisioning this network element to requesting carriers no later than 45 days after the issuance of an arbitration award.”²⁹

Each day that passes without a declaratory ruling on unbundled access to the data portion of resale loops impedes the full and timely realization of the competitive data access that the Line Sharing Order was specifically designed to achieve. According to the Commission, the Line Sharing Order was adopted to “promote the rapid deployment of advanced services to all Americans as mandated by section 706 of the 1996 Act.”³⁰ Yet, the Commission’s failure to definitively address the role of resale loops within the Line Sharing Order has jeopardized the effectiveness of the admonitions and tools that were specifically designed to advance this “rapid deployment” for a significant market segment of Americans.

In order to “ensure that American consumers will not face undue delay in receiving the benefits of technological innovation,”³¹ the Commission must demonstrate the same fervor and elevate the declaratory ruling that NewPath seeks to the same priority that the Commission placed on the implementation of the Line Sharing Order initially. Only then will the full “level competitive playing field” in the advanced services telecommunications market envisioned in the Line Sharing Order begin to materialize.

²⁷ Line Sharing Order at ¶ 160.

²⁸ Id. at ¶ 167.

²⁹ Id. at ¶ 177.

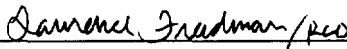
³⁰ Id. at ¶ 54.

³¹ Id. at ¶ 6.

CONCLUSION

For the reasons set forth above, NewPath hereby petitions the Commission for an expedited declaratory ruling that an ILEC's obligation to provide nondiscriminatory, unbundled access to the high-frequency or "data" portion of a loop under the Line Sharing Order and 47 C.F.R. § 51.319(h) applies to resale loops.

Respectfully submitted,



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